Comment on James C. MacPherson's Paper on Economic Regulation and the British North America Act

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Friedman and began to strike down major federal laws regulating the corporate and consumer markets. If, as Mr. Justice Holmes said, the United States Constitution does not "enact Mr. Herbert Spencer's Social Statics" let us hope that the B.N.A. Act does not enact Milton Friedman's *Free to Choose*.

**Comment on James C. MacPherson's Paper on Economic Regulation and The British North America Act**

*Peter W. Hogg*

**Introduction**

I agree with nearly everything Professor MacPherson has written in his excellent paper. This makes me a rather poor commentator. However, I shall try and briefly summarize what I see as the overall effect of the recent decisions of the Supreme Court of Canada. In this I shall be repeating points made more fully by Professor MacPherson, but with perhaps some minor changes of emphasis.

The general effect of the recent decisions is to reduce each of the principal federal powers of economic regulation. This has occurred through two developments: an explicit narrowing of each of the principal federal powers, and the introduction of uncertainty (or, in some cases, confusion) to the new, narrower definitions. The former development is good or bad, depending upon one's assessment of the desirability of national economic regulation: for those who (unlike me) believe that most economic regulation is best undertaken by the provinces the narrowing of the federal powers will be good. However, the resulting uncertainty cannot be defended. It reflects a failure by the Supreme Court of Canada to be consistent in the way in which it has defined the principal federal powers. This must have the effect of inhibiting provincial as well as federal initiatives until the new demarcation of responsibility between the two levels of government has been better settled.

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Peace, Order, and Good Government

The narrowing of the federal power over peace, order, and good government took place in the Anti-Inflation Reference.¹ While the federal wage and price controls were upheld on the dubious basis that double-digit inflation could be regarded as an emergency, the decision imposed two important restrictions on the p.o.g.g. power. First, all of the judges said that legislation enacted under the emergency branch of p.o.g.g. must be temporary: apparently permanent measures of a preventive character cannot be enacted under the emergency power. Secondly, five of the judges said that the national concern branch of p.o.g.g. was definitely not available to authorize the wage and price controls. This was on the basis that inflation was too broad and vague a conception to serve as a "matter" of legislative power. The result is rather extraordinary. It means that Canada cannot have a permanent prices and incomes policy. The federal Parliament cannot enact one, and no provincial policy could be effective. This gap in legislative power has not attracted many mourners because of the general unpopularity of prices and incomes policies. But I think that we should all be disturbed that there is such a major gap in legislative capacity.

The confusion in the p.o.g.g. power did not stem from the Anti-Inflation Reference. Indeed, the opinion of Beetz J. was a valiant attempt to synthesize the cases. However, one should note the obscurity of Laskin C.J.'s opinion, evidently disagreeing with Beetz J.'s attempt to define the national concern branch but refusing to articulate his own opinion. Perhaps that refusal contributed to the later events. The confusion started in R. v. Hauser² when four of the seven judges unexpectedly upheld the Narcotic Control Act under the national concern branch of p.o.g.g., instead of under the criminal law power. Pigeon J. for this majority articulated a new definition of the national concern branch, namely, "a genuinely new problem which did not exist at confederation".³ He approved the Russell case,⁴ despite the fact

³ Ibid., at p. 210 D.L.R., p. 1000 S.C.R.
⁴ Russell v. The Queen (1882), 7 App. Cas. 829.
that liquor abuse was obviously not "a genuinely new problem which did not exist at confederation". And he made no reference to the *Anti-Inflation Reference* in which no judge had suggested the relevance of an historical newness test, and in which the majority had disapproved the *Russell* case.

I thought that this was confusing until the decision of the court in *Labatt Breweries v. A.-G. Can.*,5 in which Estey J. for the majority suggested yet another test for the national concern branch: "‘a need for one national law which cannot realistically be satisfied by cooperative provincial action’".6 I cannot criticize the substance of this test, since Estey J. took it from my book! But I can and do criticize Estey J.’s failure to cite either the *Anti-Inflation Reference* or *Hauser* or to explain how his test could be reconciled with the latter of those cases.

The state of doctrine on the national concern branch of the p.o.g.g. power can only be regarded as a shambles. It is impossible to render an opinion as to whether the national concern branch will or will not sustain a proposed federal policy. The federal Parliament cannot rely upon this power until it has been clarified. However, I dread the thought of yet another "clarification" by yet another judge.

### Trade and Commerce

The federal power over "interprovincial and international" trade and commerce has been narrowed by *Dominion Stores Ltd. v. The Queen*.7 The refusal of the court in that case to uphold Part I of the Canada Agricultural Products Standards Act, when it seems so clearly essential to the effective operation of Part II of the Act, seems to be a reversion to the Privy Council's "watertight compartments". The only cases cited by Estey J. were the old Privy Council cases which had denied federal power to affect local trade even as an incident of the regulation of interprovincial and international trade. His failure to cite the decisions of the Supreme Court of Canada which had rejected that narrow view of federal power, for example, *Murphy*,8 *Klassen*9 (where leave to


appeal was denied), Caloil\textsuperscript{10} and the Ontario Egg Reference,\textsuperscript{11} would seem to indicate a deliberate return to pre-1949 doctrine. However, the present state of the law is confused, not only by the surprising failure to refer to the recent cases, but also by an even more surprising statement near the end of the opinion, where Estey J. says that “it may well be” that his account of the law in the earlier part of the opinion “is not now a correct description of the federal power under s. 91(2)”\textsuperscript{12}.

The federal power over “general” trade and commerce has also been narrowed by \textit{Dominion Stores Ltd. v. The Queen}.\textsuperscript{13} The refusal by the majority to follow the \textit{Canada Standard} case,\textsuperscript{14} the only unequivocal example of the use of the general trade and commerce power, is close to overruling that case, because the two statutory schemes are so similar. \textit{Labatt Breweries v. A.-G. Can.}\textsuperscript{15} is less similar because the federal standards were tied to the use of common names such as “light beer” rather than distinctive names such as “Canada Standard” or “Canada Extra Fancy”. In that case Estey J. for the majority said that the general trade and commerce power would authorize legislation that “affected industry at large or in a sweeping, general sense”;\textsuperscript{16} but it is quite unclear what, if anything, that means. After all, the Food and Drugs Act and Regulations cover most of the foods and drugs in daily use; yet they do not qualify as sufficiently “sweeping” or “general”, apparently because the Regulations (not the Act) are drafted on a commodity-by-commodity basis.

\textbf{Criminal Law}

The federal power over criminal law has been narrowed by \textit{R. v. Hauser} and \textit{Labatt Breweries v. A.-G. Can}. In \textit{Hauser} the court held that the Narcotic Control Act was not valid under the criminal law power, although it was valid under the peace, order,
and good government power. This holding was inconsistent with the case law under both powers. The exclusion from the criminal law power was based on the regulatory features of the Narcotic Control Act, although most of its provisions are directed to the prohibition of illicit drugs—a typically criminal purpose.

In *Labatt Breweries v. A.-G. Can.* the compositional standards for food enacted under the federal Food and Drugs Act were held to be invalid. Arguments seeking to support the Act under the peace, order, and good government power and under the trade and commerce power were rejected, as well as arguments based on the criminal law power. The court denied that the compositional standards were directed to the prevention of deception, but the denial seems implausible. Full disclosure of ingredients on a product label may not suffice to prevent deception (as the court implies). It is at least a rational judgment by the Parliament that consumers sometimes do not read or understand labels and should be able to count on the fact that certain products such as light beer, mayonnaise, hamburger, etc., have certain characteristics. An absence of a stipulated characteristic would have to be strongly signalled by calling the substandard product by a different name. To deny that this regime is directed to the prevention of deception is to substitute the court’s opinion as to the nature of and remedy for consumer deception for that of the Parliament.

The federal power to enforce criminal law has been left in doubt by *Hauser.* Two dissenting judges (Dickson J. with the agreement of Pratte J.) held that the federal Parliament could not provide for the enforcement of its own criminal laws. Enforcement of the criminal law was a provincial responsibility. The majority of the court (Pigeon J. with the agreement of Martland, Ritchie and Beetz JJ.) finessed this issue by their holding that the Narcotic Control Act was not a criminal law. Since the Narcotic Control Act was not a criminal law it was not necessary to decide whether the federal Parliament could provide for the enforcement of criminal law. However, by obviously straining to avoid deciding the point, the majority left open the possibility that Dickson J.’s dissenting view may become the established doctrine. Only Spence J. in a separate concurring opinion rejected Dickson J.’s view. The absence of enforcement power would be a serious impediment to federal economic regulation under the criminal law power. For the present, the state of the law is uncertain.